82-2104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982
No.

FREDERICK J. GRACE,
Petitioner,

vs.

WESTERN CONTRACTING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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THE INLAND PRESS, DETROIT, MICHIGAN

QUESTIONS PRESENTED

WHETHER THE STATE COURTS PROPERLY MAY DENY FULL APPLICATION OF STATE INTEREST-ON-JUDGMENT STATUTES TO STATE FORUM JUDGMENTS OF JONES ACT SEAMEN CAUSES RESULTING IN VERDICTS OF NEGLIGENCE AND UNSEAWORTHINESS IN FAVOR OF SEAMEN.

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OPINIONS BELOW

The Order of the Circuit Court for the County of Wayne, State of Michigan, awarding Petitioner interest under the Michigan Interest Statute, MCLA 600.6013, and its Opinion and Decision dated November 20, 1980 are both unpublished. The Order of the Michigan Court of Appeals reversing the Trial Court's award of pre-judgment interest is unpublished. The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal has not been reported.

JURISDICTIONAL STATEMENT

The Order of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal was entered on March 29, 1983. The Order of the Michigan Court of Appeal reversing the Trial Court was entered on March 27, 1981. The Order of the Trial Court granting Petitioner, a Jones Act seaman, pre-

judgment interest in accordance with the Michigan Interest Statute was entered on December 1, 1980, for reasons set forth in the Court's Opinion and Decision dated November 20, 1980.

The Jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves U.S. Const. Amend 14 §1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Also involved is the Michigan Interest Statute, MCLA 600.6013; MSA 27A.6013:

> "(1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section.
>
> (2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment shall be calculated from the date of filing the complaint to June 1, 1980 at the rate of 6% per year and on and after June 1, 1980 to the date of satisfaction of the judgment at the rate of 12% per year compunded annually.
>
> (3) For complaints filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the

rate after the date judgment is entered shall not exceed the following:

(a) Seven percent per year compounded annually for any period of time between the date judgment is entered and the date of satisfaction of the judgment which elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for any period of time between the date judgment is entered and the date of satisfaction of the judgment which elapses after May 31, 1980.

(4) For complaints filed on or after June 1, 1980, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) If a bona fide written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and the offer of settlement is substantially identical or substantially more favorable to the prevailing party than the judgment, the court may order that interest shall not be allowed beyond the date the written offer of settlement is made."

STATEMENT OF THE CASE

Petitioner, an American seaman, suffered a severe injury to his right leg aboard Respondent's vessel, the DREDGE WESTERN CONDOR. Suit was instituted in the Circuit Court for the County of Wayne, State of Michigan, with counts of negligence under the Jones Act, 46 USC §688, *et seq.*, and unseaworthiness under the General Admiralty and Maritime Law. The jury awarded damages of $275,000.00 based on both counts.

By statute, all litigants in any civil action filed in a Michigan

Court are entitled to interest on a verdict awarding damages from the date of filing of the complaint. MCLA 600.6013.

Respondent tendered payment exclusive of interest to the date of the judgment notwithstanding the Michigan Interest Statute.

Petitioner sought redress in post trial proceedings while Respondent concurrently filed a motion seeking Court declaration that the judgment was satisfied, whereupon the Trial Court ruled for Petitioner for reasons set forth in its Opinion and Decision of November 20, 1980 ordering Respondent to remit payment of interest to Petitioner in full measure of statutory allowance.

From that post judgment Order, Respondent sought Application for Leave to Appeal in the Michigan Court of Appeals. In lieu of granting leave to appeal and without allowing submission or oral argument the Michigan Court of Appeals reversed by Order dated March 26, 1981. Having lost without hearing on the merits, Petitioner applied for leave to appeal in the Michigan Supreme Court but was met by denial to Petitioner by Order dated March 29, 1983.

Because the Trial Court held the Michigan Interest Statute to apply to Petitioner, there was no constitutional issue presented at this stage of the proceedings. Since the Michigan Court of Appeals reversed without hearing on the merits and the Michigan Supreme Court refused appeal, no opportunity existed for Petitioner to brief or argue the constitutional issue here presented.

ARGUMENT

Though unquestionably this is a civil action and the Michigan Interest Statute speaks in mandatory terms, the Michigan Appellate Courts denied Petitioner benefit of the Statute because he is a Jones Act seaman. Petitioner is not the only seaman denied benefit of the Michigan Interest Statute, *Shemman* v *American Steamship Company*, 89 Mich App 656,

280 NW2d 852 (1979), leave denied, 407 Mich 875; *Reetz* v *Kinsman Marine Transit Co.*, (Court of Appeals No. 78-1856, decided 9-10-79) (unpublished), Aff'd 416 Mich 96, 330 NW2d 638 (1982).

With the exception of seamen, the Michigan Interest Statute is applied without regard to the status of the litigant, nature of claim or substantive law to be applied.

This Court holds procedural principles to apply according to the law of the forum, *Garrett* v *Moore-McCormack Co., Inc.*, 317 U'S 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). The Michigan Supreme Court holds the Michigan Interest Statute to be "procedural", *Ballog* v *Knight Newspapers, Inc.*, 381 Mich 527, 164 NW2d 19 (1969).

There being no exception in the Statute, in view of *Ballog, supra*, acclaiming the Statute to be of remedial nature, Petitioner should be entitled to interest on the judgment from the date the complaint was filed. To hold otherwise is to deny Petitioner rights afforded by the Statute to other litigants similarly situated.

A reading of the Statute reveals two key elements. First, it applies to all money judgments, making no distinction to the nature of the underlying cause of action. Secondly, a Defendant may act to preclude the imposition of interest by making an offer of settlement which proves to be reasonable in light of the resulting verdict. This indicates the nature of the Statute is not intended to comprise part of the damage award but is a procedural device established to encourage defendants to try cases quickly or settle them, rather than prolonging matters to the detriment of a plaintiff's financial condition. This position is further buttressed by noting that the Statute is found in the section of the Revised Judicial Act of Michigan which is devoted to the enforcement of judgments.

It would be anomolous and incredible to denominate interest on a judgment for damages arising from the negligence of a land owner as "slip and fall interest." Likewise, "automobile

negligence interest." Similarly, "products liability interest." So it is without cogent concept of legal acumen to denominate any such thing as "Jones Act interest", as the Michigan Appellate Courts have done in denying seamen benefit of its interest statute.

There is no valid distinction between the class of Jones Act litigants electing to prosecute their claims in the Michigan Courts from other claimants including those instituting negligence or products liability actions in a multi-state setting where Michigan choice of law would apply the law of a sister state. Also included would be actions instituted in Michigan Courts seeking enforcement of a federally created cause of action. Similarly, a contract action where the contract recited it will be interpreted under the laws of a particular state. The Michigan Courts allow full measure of interest as per the statute to all such litigants who are similarly situated to Jones Act litigants.

Significantly, the jury found for Petitioner on both counts, i.e., the Jones Act and General Admiralty and Maritime Law. Irrespective of Jones Act considerations the Trial Court's award of full measure of interest based also on the General Admiralty and Maritime Law count is in accord with this Court's statement of admiralty jurisprudence and policy in *American Export Lines, Inc.* v *Alvez*, 446 US 274, 100 S.Ct. 1673, 64 L.Ed.2d 284 (1980):

> "Admiralty jurisprudence has always been inspirited with a 'special solicitude for the welfare of those men who under [take] to venture upon hazardous and unpredictable sea voyages.' " *American Export, supra*, 446 US at 285. (citation omitted)

In holding that State Law loss of society remedies would be encompassed under the Federal Maritime Law, this Court stated:

> "Nor do we read the Jones Act as sweeping aside general maritime law remedies. Notwithstanding our

> sometime treatment of longshoremen as pseudo-seamen for certain Jones Act purposes (citations omitted) the Jones Act does not exhaustively or exclusively regulate longshoremen's remedies (citations omitted). Furthermore, the Jones Act lacks such preclusive effect even with respect to true seamen; thus, we have held that federal maritime law permits the dependents of seamen killed within territorial seas to recover for violation of a duty of seaworthiness that entails a stricter standard of care than the Jones Act." (citations omitted) *American Export, supra, at 282-283.*

In addition to finding no Jones Act statutory preemption, this Court reasoned that as a matter of policy, the same result must follow:

> "Apart from the question of statutory pre-emption, the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law. The two statutes were enacted within days to address related problems — yet they are 'hopelessly inconsistent with each other.' (citations omitted) The Jones Act itself was not the product of careful drafting or attentive legislative review (citations omitted); assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, which was incorporated into the Jones Act (citations omitted). Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts." *American Export, supra,* at 283-284.

The same policy indicates the Michigan Interest Statute, held to be "procedural" by the Michigan Supreme Court, should be applied to a Jones Act litigant because remedial omission in the Jones Act of interest on judgment is *not* evidence of *considered congressional policy making.* Moreover, to determine whether Michigan Law should give or withhold a remedy, this Court states the Rule to be:

> "But it is a settled canon of maritime jurisprudence that ' "it better becomes the humane and liberal character

> of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules" ' " *American Export, supra,* at 281-282.

Michigan, surrounded by navigable waters of the Great Lakes, is a major center of maritime activity making resolution of the question presented of major significance to the general admiralty and maritime jurisprudence and the welfare of seamen.

CONCLUSION

In conclusion Petitioner prays that this Court grant his Petition for Writ of Certiorari to the Supreme Court of Michigan for the reasons herein stated.

Respectfully submitted,

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APPENDIX OF ORDERS, OPINIONS AND UNPUBLISHED DECISION

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of March in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Associate Justices.

CR 33-338

FREDERICK J. GRACE,

Plaintiff-Appellant, SC: 67043

v COA: 55302

WESTERN CONTRACTING CORPORATION, LC: 78-838619-CZ

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

STATE OF MICHIGAN—ss.

I, Corbin R. Davis, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 29th day of March, in the year of our Lord one thousand nine hundred and eighty-three.

/s/ JACQUELINE B. MacKINNON,
Deputy Clerk

[Order of Court of Appeals
Dated and Filed March 27, 1981]

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 26th day of March in the year of our Lord one thousand nine hundred and eighty-one.

Present the Honorable Dorothy Comstock Riley, Presiding Judge; Vincent J. Brennan, George N. Bashara, Jr., Judges.

FREDERICK J. GRACE,

Plaintiff-Appellee, Docket No. 55302

v L.C. No. 78-838 619 CZ

WESTERN CONTRACTING CORPORATION,

Defendant-Appellant.

In this cause an application for leave to appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED, pursuant to GCR 1963, 806.7 and 820.1(7), that the December 1, 1980 order of the Wayne County Circuit Court in this cause, awarding prejudgment interest, be, and the same is hereby REVERSED, and the motion for prejudgment interest is DENIED. *Shemman* v *American Steamship Co,* 89 Mich App 656, 676-677 (1979); *Hackett* v *Ferndale City Clerk,* 1 Mich App 6, 11 (1965); *Barton* v *Zapata Offshore Co,* 397 F Supp 778, 780 (ED La, 1975); see also Annot.: *Award of Prejudgment Interest in Admiralty Suits,* 34 ALR Fed 126, 152-153, 242-243 (1977); *Firth* v *United States,* 554 F2d 990 (CA 9, 1977).

This Court retains no further jurisdiction.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 27th day of March, in the year of our Lord one thousand nine hundred and eighty-one.

/s/ RONALD L. DZIERBICKI,
Clerk

[Order of The Trial Court
Dated and Filed December 1, 1980]

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

FREDERICK J. GRACE,
Plaintiff,

v No. 78 838 619 CZ

WESTERN CONTRACTING CORPORATION,
Defendant.

ORDER GRANTING PLAINTIFF'S MOTION
FOR POST-JUDGMENT RELIEF

At a session of said Court held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on December 1, 1980. Present: Honorable Charles Kaufman, Circuit Judge.

Order granting Plaintiff's Motion for Post-Judgment Relief, disposition of which is dependent upon Plaintiff being entitled to interest on Judgment from the date of filing of the Complaint, and Defendant having submitted its Brief contending application of the Michigan Interest Statute, MCLA 600.6013 is unavailable to Plaintiff as a seaman who suffered personal injuries and the Court being of the opinion that under Michigan procedural law Plaintiff is entitled to full measure of interest under the statute aforesaid, and that federal substantive law is not prohibitive of Plaintiff benefiting under the statute, and the Court being fully advised in the premises,

Now, Therefore,

IT IS ORDERED that Plaintiff shall be and is hereby entitled to benefit by the Michigan Interest Statute, MCLA 600.6013 and that Defendant is required to pay the standard rate of interest encompassed within the said statute so as to obtain thereafter a Satisfaction of Judgment from the Plaintiff.

IT IS FURTHER ORDERED that relief herein shall be granted in accordance with and tenor of the Opinion and Decision of this Court of November 20, 1980.

CHARLES KAUFMAN,
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

FREDERICK J. GRACE,

Plaintiff,

v 78 838 619 CZ

WESTERN CONTRACTING CORPORATION,

Defendant.

OPINION AND DECISION

This matter comes before this Court on Plaintiff's Motion for Order Holding Defendant in Contempt and for Sanctions. That portion of the motion for Order Holding Defendant in Contempt, addressed itself to the question of prejudgment interest. The Plaintiff contends that he is entitled to interest from the date of filing the complaint to the date of judgment. On the other hand, the Defendant contends that the Michigan Prejudgment Statute does not apply to a case brought under the federal statute commonly known as the Jones Act, 46 USC 688.

The Michigan Statute MCLA 600.6013 provides that "interest shall be allowed on any money judgment recovered in a civil action . . ." The Michigan Statute is void of exceptions. Nevertheless, the Defendant contends that federal substantive law prohibits operation of the Act in seamen personal injury cases and cites in support *Shemman* v *American Steamship Co.*, 89 Mich App 656 (1979).

This Court would hold that procedure principles apply in accordance with the law of the forum. This is supported by the case of *Garrett* v *Moore-McCormack, Inc.*, 317 US 239 (1942). The Michigan Interest Statute has been held to be procedural, *Ballogg* v *Knight Newspapers, Inc.*, 381 Mich 527 (1969). There being no exceptions in the statute and in view of the *Ballogg*

decision interpreting the statute as remedial and procedural, it follows that Plaintiff in this case is entitled to interest on the judgment from the date the complaint is filed. This Court will also conclude that federal substantive law is not prohibitive of a plaintiff benefiting under a Michigan statute which has been deemed to be procedural and the matter having been adjudicated in the state court.

In the *Shemman* case, contrary to Defendant's position, the Court did not dispose of the interest issue for the obvious reason that the issue of interest had no consequence to the decision. That part of the opinion relating to interest is mere *dicta* which has no binding affect [sic]. Furthermore, a reading of that case reveals it did not address the question of interest on a judgment arising under an unseaworthiness claim based on General Admiralty and Maritime Law, but dealt only with the negligence cause of action. Negligency [sic] and unseaworthiness are separate and independent forms of action. *Mitchell* v *Trawler Racer, Inc.*, 362 US 539, (1960). Here, the question of interest on the claim of unseaworthiness is met with guidelines of the Supreme Court of the United States in a recent decision. *American Export Lines, Inc.* v *Alvez*, 100 S Ct 1673 (1980). The Court stated: "The Jones Act does not exhaustively or exclusively regulate remedies and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law . . ." In addition, as a matter of policy the Court stated:

> "It is a settled kind of maritime jurisprudence that it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy when not required to withhold it by established and inflexible rules."

It, therefore, is the decision of this Court that Plaintiff is entitled to benefit by the Michigan Interest Statute MCLA 600.6013 and that the Defendant is required to pay the stand-

ard rate of interest encompassed within this statute in order to obtain a Satisfaction of the Judgment.

An Order in conformance with this opinion may be presented.

CHARLES KAUFMAN
Circuit Judge

(A True Copy)
James R. Killeen, Clerk

By: _____
Deputy Clerk

[Unpublished Decision of the Michigan Court of Appeals in Reetz v Kinsman Marine Transit Company, Court of Appeals No. 78-1856, Dated and Filed September 10, 1979]

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD L. REETZ,
Plaintiff-Appellee,
v Docket # 78-1856
KINSMAN MARINE TRANSIT COMPANY,
Defendant-Appellant.

BEFORE: R. M. Maher, P.J., and Bronson and A. E. Moore, JJ.

PER CURIAM

Plaintiff brought suit under the Jones Act, 46 USC 688, for injuries sustained while performing his duties on a lake carrier owned by the defendant. Defendant appeals from the jury's verdict in favor of plaintiff for $800,000.

Defendant argues that the conduct and argument of counsel for plaintiff was so inflammatory that the jury was prejudiced thereby. Defendant's allegations of misconduct fall into four categories: references to the plaintiff's ineligibility for worker's compensation or any other benefits, to the wealth and life-style of the chairman of the board of the defendant company, to an alleged cover-up and to jury awards in other cases.

Counsel for plaintiff first mentioned plaintiff's ineligibility for worker's compensation in his opening statement, stating that plaintiff, unlike other workers, had no right to any compensation. Subsequently, counsel for defendant sought to elicit testimony from plaintiff that he had in fact received payments for maintenance and cure. Plaintiff's counsel at first objected and the objection was sustained. Later, however, he withdrew his objection, and plaintiff testified that he had

received $8.00 per day and had no medical costs himself. Thereafter, counsel for plaintiff in redirect examination of plaintiff implied that defendant had wrongfully cut off payments of maintenance and cure and had shifted the burden of plaintiff's medical care to the taxpayers. No objection was made by defendant to this testimony. During questioning of an employee of defendant, defense counsel elicited testimony (over repeated objections by counsel for plaintiff) that defendant had ceased payment of maintenance and cure to plaintiff because the necessary proof of disability had not been filed by plaintiff. In closing argument, plaintiff's counsel once again mentioned that plaintiff was not eligible for worker's compensation benefits, and twice stated that defendant had cut off payment of maintenance and cure in an attempt to force plaintiff to give up his lawsuit. No objection to this argument was made by defense counsel.

During cross-examination of defendant's vice-president, Paul Doncevic, counsel for plaintiff repeatedly questioned the witness about the relationship between defendant and George Steinbrenner, III, owner of the New York Yankees baseball club and chairman of the board of the corporation of which defendant is a subsidiary. Following testimony by the witness that defendant had sold its ships to another company, counsel for plaintiff asked him whether Steinbrenner had not divested himself of the ships at the insistence of the U.S. Attorney General. Upon objections by defense counsel, however, the question was withdrawn. Steinbrenner's name also came up on cross-examination of Henry Ewers, the mate who was in charge of the crew when plaintiff was injured, as counsel for plaintiff sought to give the impression that witness was biased by reason of being employed by a company owned by Steinbrenner.

Counsel also implied in questioning Ewers that the witness was being paid for his testimony and that he was suppressing evidence which was within his control, at the behest of his employer, Steinbrenner, despite the witness' steadfast denials. Later, in closing argument, counsel argued at length that Ewer's [sic] testimony was not credible because he was being paid to cover up for defendant and for George Steinbrenner, likening the witness' credibility to the Watergate scandal. Finally, counsel suggested that one of the circumstances the jury could consider in assessing damages was Steinbrenner's ownership of a baseball team, compared to plaintiff's inability to participate in sports. Again, defense counsel made no objection.

Defense counsel did object, however, when counsel for plaintiff in closing argument mentioned an award of $3,000,000 in damages to someone who tried to commit suicide, and the court sustained the objection. In his rebuttal argument, counsel twice more mentioned multimillion dollar verdicts in other cases, and defense counsel's objections were again sustained. Plaintiff's counsel thereafter confined himself to arguing that the instant case required a verdict in the millions of dollars to provide adequate compensation to plaintiff.

We begin our discussion by noting the general rule that a party objecting to improper jury argument must make a motion for a mistrial or affirmatively request a curative instruction. Without such action, the issue has not been preserved for appellate review. *Koepel* v *St. Joseph Hospital*, 381 Mich 440, 442-443; 163 NW2d 222 (1968). However, this Court will review improper but unobjected-to remarks of counsel, limited to a consideration of whether the remarks were so extremely prejudicial that even an instruction by the trial court would not undo the possible harm. *Hill* v *Husky Briquetting, Inc*, 78 Mich App 452, 458; 260 NW2d 131 (1977), *Smith* v *E R Squibb*

& *Sons, Inc*, 69 Mich App 375, 386; 245 NW2d 52 (1976). It has also been held that failure to object to prejudicial questioning bars appellate review unless there it manifest justice. *George* v *Travelers Indemnity Co*, 81 Mich App 106; 265 NW2d 59 (1978).

In view of the fact that much of the conduct complained of on appeal passed without objection in the trial court, we would in the ususal case be inclined to consider the error waived.[1] However, we cannot close our eyes to the fact that counsel for plaintiff engaged throughout the trial in a course of conduct which can only be described as a deliberate and calculated attempt to prejudice the jury by means of irrelevant evidence and inflammatory argument. Counsel first sought to appeal to the sympathy of the jury by his misleading reference to plaintiff's ineligibility for statutorily-mandated benefits such as worker's compensation, a tactic similar to that recognized as improper in *Vanden Bosch* v *Consumers Power Co*, 56 Mich App 543; 224 NW2d 900 (1974) (holding improper reference to lack of alternative remedy where plaintiff was receiving worker's compensation benefits). Counsel repeatedly injected irrelevent, potentially prejudicial material about the chairman of the board of defendant's parent corporation, George Steinbrenner, III, and implied that Steinbrenner had suborned perjury in an attempt to escape liability for plaintiff's injuries. See *Shemman* v *American Steamship Co*, ____ Mich App

[1] This inclination is reinforced in the case of the references to plaintiff's lack of another source of compensation by the fact that defense counsel was somewhat successful in getting refuting evidence before the jury. Additionally, as to the attack on the credibility of the witness Ewers, we note that defense counsel sought to blunt the effectiveness of plaintiff's counsel's tactics by reading portions of the witness' deposition to the jury, to demonstrate that counsel for plaintiff had browbeaten and badgered the witness.

_____; _____ NW2d _____ (Docket #77-2239, rel'd April 5, 1979). Counsel badgered witnesses in an attempt to secure admissions that plaintiff's employer had engaged in a cover-up to escape liability and, undaunted by his failure to elicit any evidence of perjury or of a cover-up, nonetheless argued at length to the jury that defendant had presented perjured testimony and prevented the jury from hearing witnesses who would have exposed the truth. *Cf. Kern* v *St Luke's Hospital Association of Saginaw*, 404 Mich 339; 273 NW2d 75 (1978). Finally, counsel improperly injected a reference to the size of a verdict in another case, and twice more mentioned multi-million-dollar verdicts in other, unspecified cases, despite the admonitions of the court to avoid the subject. *Cf. Finn* v *City of Adrian*, 93 Mich 504; 53 NW 614 (1892).[2]

While any one of the examples above may not have been inflammatory or overly prejudicial, taken as a whole they demonstrate a deliberate and calculated attempt to prejudice the jury. Where remarks are deliberately injected and constitute an inflammatory plea to the jurors' passions, a new trial is properly ordered. *Saginaw Twp* v *Stanulis*, 68 Mich App 314, 316; 242 NW2d 769 (1976), *Shemman* v *American Steamship Co, supra.*

[2] We find plaintiff's attempt to distinguish the *Finn* case unpersuasive. It is true that counsel in this case did not mention the name of the earlier case, as he did in *Finn*. He did, however, refer to the facts of the other case, which presented a much less sympathetic plaintiff (an attempted suicide) than plaintiff herein.

We therefore reverse and remand for a new trial.

Inasmuch as the matter is to be retried, we address plaintiff's cross appeal, wherein it is claimed that interest should have been awarded from the date of filing the complaint pursuant to MCL 600.6013; MSA 27A.6013. This issue has been decided by this Court:

> "The trial court was correct in denying prejudgment interest. The Jones Act incorporates the Federal Employer's Liability Act. *Garrett* v *Moore-McCormack Co, Inc*, 317 US 239, 244-245; 63 S Ct 246; 87 L Ed 2d 239 (1942). The allowance of interest on such judgments is a matter of federal substantive law. *Louisiana & A R Co*, 142 F 2d 847 (CA 5, 1944). See also *Hanley* v *Erie R Co*, 81 NYS2d 100 (1948)." *Shemman* v *American Steamship Co, supra.*

82-2104

No._____

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK J. GRACE,
Petitioner,
vs.
WESTERN CONTRACTING CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

ARGUMENT

The goal of Admiralty jurisdiction is one of uniformity to insure that all parties will receive equal treatment in all jurisdictions and in all forums. *Southern Pacific Co.* v. *Jenson*, 244 U.S. 205, 37 S.Ct. 470 (1916). This is particularly true with respect to the Jones Act which is to be given a "uniform application throughout the country unaffected by local views of common law rules." *Garrett* v. *Moore-McCormick Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 250 (1942). Thus, the remedy provided by F.E.L.A. is exclusive and supersedes all state laws covering the same

area. Further, an award of damages and "accrued interest presents a question of substantive law." *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 F.2d 847, 848 (5th Cir. 1944). This uniform application of right and remedies afforded a seaman insures equal treatment in all forums and thus discourages forum shopping.[1]

It is precisely this attempt to maintain uniformity of treatment of all seamen which has led the Michigan Courts to continuously deny seamen the prejudgment interest provided for in MICH. COMP. LAWS § 600.6013 (1980) (MICH. STAT. ANN. § 27A.6013 (Callaghan 1977)).[2] In each decision the respective panels of the Michigan Court of Appeals correctly looked to federal substantive law and not Michigan law as the basis for its ruling.

The uniformity of application of federal substantive law has also been the basis for courts in other jurisdictions to deny prejudgment interest to a Jones Act seaman. In *Moore-McCormack Lines, Inc.* v. *Amirault*, 202 F.2d 893 (1st Cir. 1953), the court set forth the general proposition that:

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[1] The instant matter presents a classic case of forum shopping. The plaintiff, a New Jersey resident, instituted this action in Michigan against a Florida corporation to recover damages for injuries sustained as a result of an accident in navigable waters in and around Tampa Bay, Florida. The only connection with Michigan was the fact that Western Contracting, at the time the suit was filed, maintained offices in Michigan.

[2] *Shemman* v. *American Steamship Company*, 89 Mich App 656 (1979); *Reetz* v. *Kinsman Marine Transit Company*, Court of Appeals No. 78-156 (September 10, 1979); *Grace* v. *Western Contracting Corporation*, Court of Appeals No. 55302 (March 27, 1981); *Ahmed* v. *American Steamship Company*, Court of Appeals No. 62445, a fourth panel of this Court refused to grant leave to the plaintiff to review a lower court's denial of prejudgment interest. The order of this Court based its decision on *Shemman*, *supra*.

> [b]ut this is not a "typical diversity case" under which federal district court sitting in Massachusetts would be obliged to apply the local substantive law of Massachusetts in accordance with *Erie Ry. Co.* v. *Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.*, 1941, 313 U.S. 486, 61 S.Ct. 1020, 85 L.Ed. 1477. The claims sued on here were not based upon Massachusetts law, but were for maritime torts. It is well settled that by force of the Constitution itself, *when a common law action is brought, whether in a state or in a federal court, to enforce a cause of action cognizable in admiralty, the substantive law to be applied is the same as would be applied in admiralty court – that is the general maritime law*, as developed and declared, in the last analysis by the Supreme Court of the United States, or as modified from time to time by Act of Congress. (citation omitted) . . . . But whether such diversity existed or not, it is still true that the substantive law to be applied in determining both liability and the amount of damages to be embodied in the money judgment is federal law, not state law. . . . Furthermore, even if the action had been brought in a Massachusetts state court, the substantive law to be applied would still be federal law. (citation omitted) (emphasis added) 202 F.2d at 896-97.

In *Louisiana & Arkansas Ry. Co.* v. *Pratt*, *supra*, the Fifth Circuit also looked to federal substantive law on the issue of the propriety of awarding prejudgment interest despite the fact that a Louisiana Statute provided for prejudgment interest in civil actions. The court concluded that the F.E.L.A. "supersedes" the Louisiana Statutes, 142 F.2d at 849, and as such refused to award the plaintiff prejudgment interest.

In *Canova* v. *Employers Mut. Liability Ins. Co. of Wisc.*, 301 F.Supp 738 (E.D. La. 1967), aff'd. *sub nom. Canova* v. *Travelers Ins. Co.*, 406 F.2d 410 (5th Cir. 1969), a barge worker commenced two suits, one a Jones Act case against his employer and the other an action under the Louisiana Direct Action Statute against the insurers of the owners of a crane. Both cases were consolidated and tried before a jury. As to the Jones Act defendant, the district court held that no prejudgment interest could be awarded:

> [a]s to the Jones Act defendants (California Company and American Insurance Company) it is the Court's view that no prejudgment interest may be allowed. This conclusion is supported by *Louisiana & Arkansas Ry. Co.* v. *Pratt*, 142 F.2d 847 (5th Cir. 1944), wherein the court held that under the F.E.L.A. (to which the Jones Act is an amendment) interest was not properly allowable from the date of judicial demand, notwithstanding the statute of Louisiana to the contrary. (citations omitted). 301 F.Supp at 739.

Significantly, the ruling as to the unavailability of prejudgment interest in a Jones Act case tried to a jury was not even appealed. The only issue on appeal turned on whether the General Maritime Law or Louisiana Law would govern prejudgment interest vis-à-vis the non-Jones Act defendant, and as to that defendant it was held that:

> [t]he cause of action arose on navigable waters and the case was litigated under the Maritime Law. The trial judge was therefore correct in looking to that *same body of substantive law* to determine the propriety of awarding interest before judgment. (emphasis added). 406 F.2d at 412.

In *Sanford Bros. Boats, Inc.* v. *Vidrine*, 412 F.2d 958 (5th Cir. 1969), the Fifth Circuit held it to be error to award prejudgment interest:

> [w]e consider next the issue of prejudgment interest. The district court in entering judgment for plaintiff awarded interest on the judgment from the date of judicial demand. This was error. The instant case was tried to a jury (citations omitted). While prejudgment interest has been deemed appropriate in Jones Act cases tried in Admiralty, (citations omitted) the courts have uniformly held that prejudgment interest is not available in FELA cases and Jones Act cases tried at law. (citations omitted) 412 F.2d at 972.

Finally, in *Barton* v. *Zapata Offshore Company*, 397 F.Supp 778 (E.D. La. 1975), cited by the Michigan Court of Appeals in its ruling on the instant matter, the court was confronted with the plaintiff's assertion that he was entitled to prejudgment interest, if not for his Jones Act claim, then certainly under the general Admiralty and Maritime Law. In response to his contention, the *Barton* court noted:

> [t]here might be merit to this analysis if either the jury had denied recovery under the Jones Act and found unseaworthiness, or if there were some element of admiralty damage not allowable under the Jones Act. But here the verdict found the employer liable under the Jones Act as well as the general maritime law; the elements and amounts of damage claimed were identical. If the court may not award prejudgment interest on the Jones Act claim, there is no separate 'pure' admiralty item on which to allow interest. Furthermore, the reason given by the court in *Moore-McCormack Lines, Inc.* v. *Richardson, supra*, for denying a right

> to prejudgment interest in jury-tried Jones Act cases — that jury considers the delay in making an award — would apply with equal force to a jury-tried unseaworthiness claim. In sum, the plaintiff may not claim the benefits of a jury trial on an unseaworthiness claim completely merged with a Jones Act claim as to quantum and then attempt to unscramble the verdict after he prevails. 387 F.Supp at 780.

Petitioner tried this action at law to a jury on the theory of negligence under the Jones Act and unseaworthiness under the General Maritime Law.[3] In such a situation, the law in Michigan and throughout the United States unanimously sets forth that there is no entitlement to prejudgment interest as a matter of substantive Federal Maritime Law.

Petitioner's assault on this well-settled rule of Federal Maritime Law is grounded solely upon a decision of the Michigan Supreme Court which did not even concern the Maritime Law. In *Ballog* v. *Knight Newspapers, Inc.*, 381 Mich. 527, 164 N.W.2d 19 (1969), the Michigan Supreme Court was confronted with the question of whether a 1965 amendment to MICH. COMP. LAWS § 600.6013 (1980) (MICH. STAT. ANN. § 27A.6013 (Callaghan 1977)) should be retroactively applied to a common law tort case governed exclusively by Michigan law. As the *Ballog* court stated, the only issue therein was purely one of legislative intent. *Id* at 541.

In *this* matter, the only issue is one of federal preemption of the question of prejudgment interest in Jones Act cases tried at law to a jury and the uniformity of Federal Maritime Law. That the Supreme Court of the

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[3] In the instant matter, a general verdict was entered in favor of the plaintiff for $275,000.00. There was no breakdown by the jury on the question of liability under the Jones Act versus liability under the General Maritime Law.

State of Michigan held in *Ballog* that under Michigan law prejudgment interest was considered to be "related to remedies and modes of procedure" rather than "substantive" (at least insofar as the issue of retroactive application of the statute was concerned) does not detract from the fact that under the governing law of this case, as has been uniformly recognized, "[t]he allowance of interest on such judgments is a matter of federal substantive law." *Shemman, supra,* at 677.

Beyond the question of federal supremacy in resolving the procedural/substantive dichotomy, lies an even more basic flaw in Petitioner's argument. The central theme of *Ballog* was whether the legislature intended MICH. COMP. LAWS § 600.6013 (1980) (MICH. STAT. ANN. § 27A.6013 (Callaghan 1977)) to be applied retroactively in circumstances where the authority of the Michigan lawmakers to formulate such rule was clear and unchallenged. In this case, Petitioner would have this Court infer that by enacting M.C.L. 600.6013, the Michigan legislators intended to grant Jones Act seamen suing in Michigan courts a heretofore unknown right to prejudgment interest.

As was earlier noted, this Court has long recognized that a state court may not apply a local rule of decision in derogation of substantive Federal Maritime Law simply because in that state the local rule may be considered merely remedial or procedural. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942).

Contrary to the situation in *Ballog*, it is clear that the Michigan legislature had no authority to expand or contract the rights granted to seamen by Congress in the Jones Act, even had it so desired. The principle that "state legislation is clearly invalid where it actually conflicts with the established General Maritime Law or federal statutes" was referred to by Gilmore and Black in *The Law of Admiralty* (2d ed. 1975), at page 48,

as so firmly established as to be a "constitutional truism." Thus, since the Michigan legislature could not have enacted a statute specifically granting prejudgment interest to Jones Act suitors, it strains all reason and logic to suppose that it could have accomplished the same result in a non-specific, general statute, or that it ever even intended such a result.

Finally, Petitioner's Fourteenth Amendment argument that the denial of prejudgment interest to Jones Act seamen under M.C.L. 600.6013 creates a disparity of treatment among individuals similarly situated is wholly without merit. It should be initially noted that seamen have long been treated differently than other litigants. See *Mannich* v. *Southern S.S. Co.*, 321 U.S. 96, 103-104, 64 S.Ct. 455, 459 (1944). Further, the mere difference in the application of a law does not, of itself, constitute a violation of the Equal Protection Clause. This Court has consistently held that:

> [m]any times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *Williams* v. *Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 10 (1968)

Michigan's application of prejudgment interest, rather than creating disparate treatment among litigants, insures and promotes the uniform treatment of all Jones Act seamen throughout the United States.

CONCLUSION

Michigan courts have consistently interpreted Michigan's prejudgment interest statute in conformity with prevailing federal case law in order to insure the uniform application of the Jones Act to all seamen irrespective of the forum in which the litigation is instituted. The interpretation of the Michigan statute is peculiarly within the purview of the Michigan courts and does not present a question for review by this Court. Respondent would therefore request this Court to deny the Petition for Writ of Certiorari to the Supreme Court of Michigan.

Respectfully submitted,

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Dated: July 20, 1983

APPENDIX OF ORDERS, OPINIONS, AND UNPUBLISHED DECISION

[UNPUBLISHED OPINION OF MICHIGAN COURT OF APPEALS IN *AHMED* v *AMERICAN STEAMSHIP COMPANY*, COURT OF APPEALS NO. 62445 DATED AND FILED MAY 4, 1982]

(State of Michigan — Court of Appeals)

(Sultan S. Ahmed, Plaintiff-Appellant, vs. American Steamship Co., Defendant-Appellee — No. 62445)

Before: D.C. Riley, P.J. and V.J. Brennan and N.J. Kaufmann JJ.

In this cause a delayed application for leave to appeal is filed by plaintiff-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented. See, *Shemman* v *American Steamship Co.*, 89 Mich App 656, 676-677 (1979).